No. 84-600

In the Supreme Court of the United States

OCTOBER TERM, 1984

KAREN A. COOPER, PETITIONER

v.

UNITED STATES POSTAL SERVICE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

REX E. LEE
Solicitor General

RICHARD K. WILLARD
Acting Assistant Attorney General

ROBERT S. GREENSPAN
MARILYN S. G. URWITZ
Attorneys

Department of Justice
Washington, D.C. 20530
(202) 633-2217

QUESTION PRESENTED

Whether the court of appeals correctly held that petitioner's attempt to amend her complaint nearly eight months after it was filed in order to name the proper governmental defendant did not relate back to the date on which the complaint was filed, because petitioner had failed to satisfy the requirements specified in Fed. R. Civ. P. 15(c) for relation back in situations in which a plaintiff fails to name the proper federal officer as the defendant.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A8) is reported at 740 F.2d 714. The opinion of the district court (Pet. App. A9-A11) is unreported.

JURISDICTION

The judgment of the court of appeals (Pet. App. A12) was entered on July 12, 1984, and the petition for a writ of certiorari was filed on October 30, 1984. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTE AND RULE INVOLVED

1. Section 717(c) of the Civil Rights Act of 1964, 42 U.S.C. 2000e-16(c), provides in pertinent part:

> Within thirty days of receipt of notice of a final action taken by a department, agency, or unit * * * an employee or applicant for employment, if aggrieved by the final disposition of his complaint * * *, may file a civil action as provided in section 2000e-5 of this title, in which civil action the head of the department, agency, or unit, as appropriate, shall be the defendant.

2. Rule 15(c) of the Fed. R. Civ. P. provides:

> *Relation Back of Amendments.* Whenever the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, the amendment relates back to the date of the original pleading. An amendment changing the party against whom a claim is asserted relates back if the foregoing provision is satisfied and, within the period provided by law for commencing the action against him, the party to be brought in by amendment (1) has received such notice of the institution of the action that he will not be prejudiced in maintaining his defense on the merits, and (2) knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against him.
>
> The delivery or mailing of process to the United States Attorney, or his designee, or the Attorney General of the United States, or an agency or officer who would have been a proper defendant if named, satisfies the requirement of clauses (1) and (2) hereof with respect to the United States or any agency or officer thereof to be brought into the action as a defendant.

STATEMENT

1. In December 1980, petitioner filed an administrative complaint with the Western Regional Headquarters of the United States Postal Service alleging that she had been denied a part-time regular carrier position because of her sex, in violation of Section 717(a) of Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e-16(a). Pet. App. A2, A13. On September 30, 1982, petitioner received a letter from the Regional Postmaster General informing her that because she had not responded to the proposed denial of her complaint within the time specified in applicable regulations and the notice of proposed denial, her complaint was denied. *Id.* at A2, A13-A15. The letter informed her that she either could appeal this decision to the Equal Employment Opportunity Commission (EEOC) within 20 days or, in lieu of such an appeal, could file a civil action in the appropriate district court within 30 days of her receipt of the decision. *Id.* at A14-A15.

Under Section 717(c) of the Civil Rights Act of 1964, 42 U.S.C. 2000e-16(c), "[w]ithin thirty days of receipt of notice of final action" by a federal department or agency on a complaint of discrimination, an employee or applicant for employment aggrieved by the action "may file a civil action * * *, in which civil action the head of the department [or] agency * * * shall be the defendant." On October 29, 1982, one day before this 30-day period expired, petitioner, represented by counsel, filed a complaint in the

United States District Court for the Southern District of California pursuant to Section 717(c). However, she named as the sole defendant the Postal Service, rather than the Postmaster General, who is the head of the federal agency concerned and therefore is, under the statute, the only proper defendant in a Title VII suit. She did not serve copies of the complaint on the United States Attorney or the Attorney General until January 1983 or on the Postmaster General until February 1983. The record does not indicate when the Postal Service was served, but petitioner has conceded that such service did not occur within the 30-day period that expired on October 30, 1982. Pet. App. A2, A10.

On April 5, 1983, the government moved to dismiss the complaint on the ground that petitioner had not named the Postmaster General as the defendant, as required by Section 717(c). On June 20, 1983, petitioner moved to amend her complaint to substitute the Postmaster General as the defendant and to have that amendment relate back under Fed. R. Civ. P. 15(c) to the date on which the complaint was filed. The district court denied petitioner's motion. The court explained that the Postmaster General had not received notice of the institution of the suit within 30 days after petitioner's receipt of the administrative denial of her complaint and thus had not received such notice "within the period provided by law for commencing the action against him," as required by clause (1) of Rule 15(c) in order for the amendment naming a new defendant to relate back. The district court accordingly granted the government's motion to dismiss the complaint. Pet. App. A9-A11.

2. The court of appeals affirmed (Pet. App. A1-A8). The court noted that in its prior decision in *Williams* v. *United States*, 711 F.2d 893 (9th Cir. 1983), the plaintiff had filed a suit under the Suits in Admiralty Act against the Federal Aviation Administration seven days before the statutory period for filing the suit was to expire. In *Williams*, the court of appeals held that the district court had properly denied the plaintiff's motion under Rule 15(c) to name the United States as the defendant because the United States did not receive notice of the action until one day after the statutory filing period had run. 711 F.2d at 898. The court of appeals concluded that the same result must obtain here, because petitioner failed to notify the proper defendant (the Postmaster General) of the institution of the suit until after the applicable 30-day filing period had run and the amendment of the complaint therefore could not relate back under Rule 15(c).

The court of appeals explained that although the result might seem harsh in this particular case, that result was "the inevitable corollary of [the court's] obligation in all cases to follow precedent and to implement controlling statutes and procedural rules," since it could "ignore neither the limitations on the filing of Title VII actions contained in section 2000e-16(c) nor the notice requirement for the substitution of parties in amended pleadings established by the plain language of rule 15(c)" (Pet. App. A7). The court observed that Rule 15(c) had been amended in 1966 specifically to afford relief to "diligent parties litigating against the federal government" (Pet. App. A8): under the second paragraph of Rule 15(c), which was added by the 1966 amend-

ments, a party may give the necessary notice of the institution of the action within the time allowed by delivering or mailing process to the United States Attorney, the Attorney General, or the federal agency or officer who would have been a proper party if named. "Thus," the court concluded, "[petitioner] could have preserved her Title VII action by serving a copy of the complaint on either the United States Attorney or the Attorney General before October 30, 1982," but "[s]he failed to do so" (Pet. App. A8).

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or another court of appeals. Review by this Court therefore is not warranted. Although petitioner relies on this Court's decision in *Baldwin County Welcome Center* v. *Brown*, No. 83-131 (Apr. 16, 1984), the Court's opinion in that case undermines rather than supports her position, because the Court there made clear that compliance with the Federal Rules of Civil Procedure is required in a suit under Title VII just as in any other civil action.

1. a. Petitioner first contends (Pet. 7, 8-10, 12-13) that the Court should grant review in this case to consider whether compliance with the 30-day period within which a suit must be filed against the head of a federal agency under Title VII is jurisdictional or whether that period is subject to waiver, estoppel, or equitable tolling. Contrary to petitioner's contention, however, this case simply does not present that issue.

Petitioner in fact *did* file a complaint within 30 days of her receipt of the notice of final agency action. Accordingly, neither the district court nor the

court of appeals held that dismissal of her suit was required because the doctrines of waiver, estoppel, and equitable tolling are inapplicable in a federal sector Title VII suit. By contrast, the appellate decisions indicating that the 30-day period in Section 717(c) is not jurisdictional in nature—and which, according to petitioner, conflict with the decision below—deal expressly with situations in which the plaintiff did *not* file an action within 30 days of receipt of the final agency action. See *Martinez* v. *Orr*, 738 F.2d 1107 (10th Cir. 1984); *Milam* v. *United States Postal Service*, 674 F.2d 860 (11th Cir. 1982).[1] Because petitioner filed a complaint within 30 days, the only issue presented is whether Fed. R. Civ. P. 15(c) permitted her to amend that complaint to name a party who was not notified of the action until months later. See pages 14-24, *infra*. The court of appeals understood the case to be limited in precisely that manner: it stated that the "only issue" before it was whether Rule 15(c) should be interpreted to permit the amendment of the complaint naming the Postmaster General to relate back (Pet. App. A4). Contrary to petitioner's assertion (Pet. 9, 12), the court did not suggest that its answer to that question de-

[1] Petitioner also maintains (Pet. 8) that *Sessions* v. *Rusk State Hospital*, 648 F.2d 1066 (5th Cir. 1981), and *Saltz* v. *Lehman*, 672 F.2d 207 (D.C. Cir. 1982), conflict with the ruling here. As petitioner acknowledges, however, *Sessions* does not involve a construction of Section 717(c) at all, but instead addresses the 90-day limitation applicable under Section 706(f) of Title VII, 42 U.S.C. 2000e-5(f), in suits against private employers and state and local governments. Nor does the District of Columbia Circuit's decision in *Saltz* concern the suit-filing limitation of Section 717(c); it deals only with the time period for filing an *administrative charge*. See 29 C.F.R. 1613.214(a).

pended on whether the 30-day suit-filing is jurisdictional in nature. The court made clear that if the requirements of Rule 15(c) had been satisfied, it would have held that the amendment related back even though the 30-day filing period is regarded by the Ninth Circuit as jurisdictional.[2]

b. In any event, even if this case could be thought to present the question whether compliance with the 30-day period for filing suit under Section 717(c) is jurisdictional in nature, that issue does not warrant review by this Court. Indeed, the Court recently denied certiorari in another case in which the petitioner sought review on precisely the same issue, *Stuckett* v. *United States Postal Service*, No. 83-6839 (Oct. 9, 1984), and there is no reason for a different result here.

The conclusion that compliance with the 30-day time limit in Section 717(c) is a jurisdictional prerequisite to suit is supported by principles firmly established by numerous decisions of this Court. It is axiomatic that " 'the United States, as sovereign, "is immune from suit save as it consents to be sued . . . and the terms of its consent to be sued in any court define that court's jurisdiction to entertain the suit" ' " (*Lehman* v. *Nakshian*, 453 U.S. 156, 160 (1981), quoting *United States* v. *Testan*, 424 U.S. 392, 399 (1976), and *United States* v. *Sherwood*, 312 U.S. 584, 586 (1941)). As with any condition placed

[2] The court of appeals did cite its prior decision in *Rice* v. *Hamilton Air Force Base Commissary*, 720 F.2d 1082, 1083 (9th Cir. 1983), noting in parentheses the holding in that case that the "thirty day limit is jurisdictional" (Pet. App. A3-A4). But the court cited the *Rice* decision for the proposition that Section 717(c) "gives federal employees only thirty days after receiving notice of final agency action on their claim in which to file suit" (Pet. App. A3). That proposition, of course, is evident on the face of Section 717(c).

on a suit against the sovereign, "this Court has long decided that limitations * * * upon which the Government consents to be sued must be strictly observed and exceptions thereto are not to be implied" (*Soriano* v. *United States*, 352 U.S. 270, 276 (1957)). See also *Munro* v. *United States*, 303 U.S. 36, 41 (1938); *United States* v. *Kubrick*, 444 U.S. 111, 117-118 (1979). Only two Terms ago, the Court reaffirmed that "[w]hen waiver legislation contains a statute of limitations, the limitations provision constitutes a condition on the waiver of sovereign immunity" that must be "strictly observed" (*Block* v. *North Dakota*, 461 U.S. 273, 287 (1983)).

In light of these principles, limitations periods in statutes waiving the sovereign immunity of the United States may not be waived or tolled by a court unless Congress has explicitly so provided. See *Munro* v. *United States*, 303 U.S. at 41; *Soriano* v. *United States*, 352 U.S. at 275-276. Similarly, the notion that the United States might be equitably estopped from invoking a statutory limitations period is inconsistent with this Court's numerous decisions holding that the United States may not be estopped by the acts of its agents. See, *e.g.*, *Heckler* v *Community Health Services of Crawford County, Inc.*, No. 83-56 (May 21, 1984), slip op. 8 & nn.11, 12. Indeed, this Court has twice rejected contentions that the government was equitably estopped from invoking applicable time limits prescribed by Congress. *Schweiker* v. *Hansen*, 450 U.S. 785 (1981); *INS* v. *Hibi*, 414 U.S. 5 (1973). This unbroken line of authority clearly indicates that the 30-day limit in section 717(c) is a condition placed on the consent to suits against the federal government and thus " ' "define[s] [the district court's] jurisdiction to entertain

the suit" ' " (*Lehman* v. *Nakshian*, 453 U.S. at 160, quoting *United States* v. *Testan*, 424 U.S. at 399, and *United States* v. *Sherwood*, 312 U.S. at 586). See also *Soriano* v. *United States*, 352 U.S. at 271, 273.

c. Petitioner does not mention, much less discuss, these settled principles of sovereign immunity. Instead, she argues (Pet. 7, 8, 12-13) that this Court's decisions in *Zipes* v. *Trans World Airline, Inc.*, 455 U.S. 385 (1982), and *Baldwin County Welcome Center* v. *Brown*, *supra*, require the conclusion that the 30-day limit in Section 717(c) may be tolled or waived by a court. This argument is without merit.

In *Zipes*, the Court held that compliance with Section 706(e) of Title VII, which requires an employee in the *private* sector to file an administrative charge of discrimination with the EEOC within 180 days of the alleged discriminatory act, is not a jurisdictional prerequisite to the subsequent bringing of a civil action in federal district court pursuant to Section 706(f) (455 U.S. at 393). Instead, the Court held that the provision is "like a statute of limitations, * * * subject to waiver, estoppel, and equitable tolling" (*ibid.* (footnote omitted)). *Zipes*, however, is inapposite here. As the Seventh Circuit has observed, "[b]ecause *Zipes* involved a private defendant, we do not think that its holding may be extended to the case at bar, where principles of sovereign immunity control" (*Sims* v. *Heckler*, 725 F.2d 1143, 1145 (1984)). See also *Soriano* v. *United States*, 352 U.S. at 275 (reliance on tolling rule announced in another case "is misplaced [since] [t]hat case involved private citizens, not the Government. It has no applicability to claims against the sovereign."). Cf. *Brown* v. *GSA*, 425 U.S. 820, 833 (1976). The Court in *Baldwin County Welcome Center* simply reiterated the *Zipes* ruling. *Baldwin County Welcome Center*,

slip op. 5 n.6.[3] That decision therefore likewise does not suggest that the distinct 30-day period prescribed by Section 717(c) for filing a Title VII suit against the federal government is not jurisdictional in nature.

d. Petitioner also suggests (Pet. 8-9, 13) that review is warranted because there is a conflict among the circuits on the question whether the suit-filing period under Section 717(c) is jurisdictional in nature. She relies on *Saltz* v. *Lehman*, 672 F.2d 207 (D.C. Cir. 1982); *Milam* v. *United States Postal Service*, 674 F.2d 860 (11th Cir. 1982); and *Martinez* v. *Orr*, 738 F.2d 1107 (10th Cir. 1984).[4] The existence of those decisions, however, would not warrant review here even if this case actually involved the question of whether the 30-day period is subject to waiver, tolling, or equitable estoppel. In none of the three cases petitioner cites did the court consider the significance of the principles of sovereign immunity discussed above. *Saltz*, 672 F.2d at 208; *Milam*, 674 F.2d at 862; *Martinez*, 738 F.2d at 1110.

Moreover, these three cases all involved circumstances quite different from those presented here. Unlike this case, which involves the time period for filing

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[3] The Court did not expressly state that the 90-day limitation in Section 706(f)(1) on bringing a Title VII suit against a private employer also is not jurisdictional in nature, although it did indicate that the 90-day limitations period might likewise be subject to equitable tolling in appropriate circumstances. Slip op. 4-5.

[4] Petitioner also asserts (Pet. 8) a conflict with *Sessions* v. *Rusk State Hospital*, 648 F.2d 1066 (5th Cir. 1981). But as we have explained (see note 1, *supra*), that case did not involve a suit against the federal government, and it therefore has no bearing on the issue presented here.

a *judicial* action in district court, *Saltz* involved the time limit for filing an *administrative* charge with the agency. A court might view differently the time limit for filing an action in district court, because the latter is most clearly a condition on the waiver of sovereign immunity to *suit* (see *Cooper* v. *Bell*, 628 F.2d 1208, 1213 n.10 (9th Cir. 1980)), and in fact the District of Columbia Circuit, which decided *Saltz*, previously had held that the 30-day suit-filing period is jurisdictional in nature. *Hofer* v. *Campbell*, 581 F.2d 975, 977 (1978), cert. denied, 440 U.S. 909 (1979).

Although the Eleventh Circuit's decision in *Milam* does contain language to the effect that the 30-day period is not jurisdictional (674 F.2d at 862), that language is dicta. In *Milam*, the 30th day for filing a Title VII suit fell on a Sunday and the complaint was filed on Monday, the 31st day. The court simply held that because the last day of the 30-day period fell on a Sunday, under Fed. R. Civ. P. 6(a), the deadline for filing must be considered to have been Monday. Thus, the complaint in *Milam* was in effect timely filed within the 30-day limit prescribed by Section 717(c). The same result presumably would obtain even if the 30-day suit-filing period is regarded as jurisdictional. Cf. Sup. Ct. R. 29.1.

Finally, in *Martinez* v. *Orr*, *supra*, the Tenth Circuit did hold that Section 717(c) is not jurisdictional and could be equitably tolled in the circumstances of that case, because, in the court's view, the EEOC had misled the plaintiff in its notice of a right to sue. See 738 F.2d at 1110-1112. There is no suggestion here that the government misled petitioner into failing to name the proper defendant—a requirement that, at all events, is clear from the face of the Act. Moreover, as we explained in our Supplemental Brief in *Stuckett* v. *United States Postal Service*, *supra*,[5] the Solicitor General decided not to seek rehearing en banc in *Martinez* because the EEOC informed us that it had revised its practices to eliminate the potential for misleading the employee in the manner the Tenth Circuit identified, and the particular issue involved in *Martinez* therefore was of no continuing importance. But as we also stated in our Supplemental Brief in *Stuckett*, should the tolling issue arise again in the Tenth Circuit in another setting that appeared to be of broader importance, we would consider requesting the Tenth Circuit to reconsider the holding in *Martinez*. For these reasons, it was not clear that any circuit conflict would persist or was of sufficient importance to warrant review by this Court. Against this background, the Court denied the petition for a writ of certiorari in *Stuckett* less than three months ago. There have been no intervening events since then, and there are no other factors present here that would warrant a different disposition in this case.

e. This case would not be in any event a suitable vehicle in which to address the nature of the 30-day filing period prescribed by Section 717(c), because petitioner has suggested no basis on which her failure to file a proper complaint within that 30-day period could be excused on equitable grounds. Nor did she do so in the district court or court of appeals. Petitioner likewise did not, in the courts below, contest the proposition that the 30-day suit-filing period is jurisdictional in nature. Petitioner's efforts to interject that issue into the case at this late date should be rejected.

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[5] We have furnished counsel for petitioner with copies of our briefs in *Stuckett*.

Moreover, even if it is assumed that equitable tolling principles might be applicable in a Title VII suit against the federal government in certain circumstances, there are no such circumstances here. Like *Baldwin County Welcome Center*, "[t]his is not a case in which a claimant has received inadequate notice; or where a motion for appointment of counsel is pending and equity would justify tolling the statutory period until the motion is acted upon; or where the court has led the plaintiff to believe that she had done everything required of her [; * * * or] where affirmative misconduct on the part of a defendant lulled the plaintiff into inaction." Slip op. 4-5 (citations omitted). Section 717(c) on its face specifies the proper defendant, and there is, quite simply, no excuse for the failure by petitioner, who was represented by counsel, to comply with that explicit requirement.

2. Petitioner also contends (Pet. 10-12, 14-16) that the Court should grant certiorari to review the court of appeals' interpretation of Rule 15(c) in the particular circumstances of this case. Petitioner does not contest the holding by the courts below that the Postmaster General was the only proper defendant in this Title VII suit. Nor could she contest that holding, since Section 717(c) explicitly states that the head of the department or agency "shall be the defendant,"[6] and numerous lower court decisions

[6] Congress has not enacted a law permitting agencies to be named as parties defendant in employment discrimination suits, and it is "well established that federal agencies are not subject to suit *eo nomine* unless so authorized by Congress in 'explicit language.'" *Midwest Growers Cooperative Corp.* v. *Kirkemo*, 533 F.2d 455, 465 (9th Cir. 1976). See *Blackmar* v. *Guerre*, 342 U.S. 512, 515 (1952).

unanimously so hold.[7] Petitioner instead argues that her motion to amend the complaint to name the proper defendant, which was filed almost eight months after the original complaint and long after the 30-day period for filing suit had expired, should have related back to the date the complaint was filed. The court of appeals correctly rejected that argument, and its holding does not warrant review.

a. Under Fed. R. Civ. P. 15(c), an amendment changing the party against whom a claim is asserted relates back only if, "within the period provided by law for commencing an action against him, the party to be brought in by amendment (1) has received such notice of the institution of the action that he will not be prejudiced in maintaining his defense on the merits, and (2) knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against him." In this case, the Postmaster General (the proper defendant "to be brought in by amendment") did not receive notice of the institution of the

[7] See, *e.g.*, *Canino* v. *EEOC*, 707 F.2d 468, 472 (11th Cir. 1983); *Hall* v. *SBA*, 695 F.2d 175, 180 (5th Cir. 1983); *White* v. *GSA*, 652 F.2d 913, 916 n.4 (9th Cir. 1981); *Neubold* v. *United States Postal Service*, 614 F.2d 46, 47 (5th Cir.), cert. denied, 449 U.S. 878 (1980); *Davis* v. *Califano*, 613 F.2d 957, 958 n.1 (D.C. Cir. 1979); *Hackley* v. *Roudebush*, 520 F.2d 108, 115 n.17 (D.C. Cir. 1975); *Lage* v. *Thomas*, 585 F. Supp. 403, 405 (N.D. Tex. 1984); *Langster* v. *Schweiker*, 565 F. Supp. 407, 412 (N.D. Ill. 1983); *Quillen* v. *United States Postal Service*, 564 F. Supp. 314, 321 (E.D. Mich. 1983); *Munoz* v. *Orr*, 559 F. Supp. 1017, 1020 (W.D. Tex. 1983); *Weiss* v. *Marsh*, 543 F. Supp. 1115, 1117 (M.D. Ala. 1981); *Mosley* v. *United States*, 425 F. Supp. 50, 54-55 (N.D. Cal. 1977); *Jones* v. *Brennan*, 401 F. Supp. 622, 627 (N.D. Ga. 1975).

action "within the period provided by law for commencing an action against him"—*i.e.*, within the 30-day period provided under Section 717(c) for a federal employee to file a Title VII suit. Petitioner received the notice of the administrative denial of her complaint on September 30, 1982, and the 30-day suit-filing period therefore expired on October 30, 1982. Yet, petitioner did not serve the Postmaster General with a copy of the complaint until February 1983, almost four months after the 30-day period expired, and there is no indication that the Postmaster General otherwise received actual notice of the suit within the 30-day period.[8] The plain language of Rule 15(c) therefore refutes petitioner's contention that the attempted amendment of the complaint should have related back.

It also is significant that petitioner failed to comply with the provisions of Rule 15(c) that are specifically intended to afford a means by which a person suing the federal government can protect himself against the consequences of naming the wrong defendant. Under the second paragraph of Rule 15(c), "[t]he delivery or mailing of process to the United States Attorney, or his designee, or the Attorney General of the United States, or an agency or officer who would have been a proper defendant if named, satisfies the requirements of clauses (1) and (2) hereof with respect to the United States or any agency or officer thereof to be brought into the action as a

[8] Even if notice to the Postal Service could be deemed notice to the Postmaster General for these purposes, petitioner has conceded that the Postal Service likewise was not served with a copy of the complaint within the 30-day period, and the record does not disclose when, or even if, the Postal Service otherwise was served. See Pet. App. A2, A10.

defendant." Accordingly, if the delivery or mailing of process to any of those persons is accomplished "within the period provided by law for commencing the action against [the proper defendant]," an amendment of the complaint to name the proper defendant will relate back to the date of the filing of the complaint.

In this case, however, petitioner neither delivered nor mailed process to the United States Attorney, the Attorney General, or the Postmaster General (the "officer who would have been a proper defendant if named") within the 30-day period provided by Section 717(c) for commencing a Title VII action against the Postmaster General. Petitioner did not serve copies of the complaint on the Attorney General and United States Attorney until January 1983, well after the 30-day period expired on October 30, 1982, and, as noted above, she did not serve the Postmaster General until even later, in February 1983 (Pet. App. A2, A10). The court of appeals therefore correctly held that petitioner's amendment of the complaint on June 20, 1983 to name the Postmaster General could not relate back to the date of the filing of the original complaint on October 29, 1982. This holding is consistent with the decisions of the Ninth Circuit and every other court of appeals that has considered the identical relation-back question where the plaintiff has named the wrong federal agency or officer as the defendant. See *Williams* v. *United States*, 711 F.2d 893, 898 (9th Cir. 1983); *Hughes* v. *United States*, 701 F.2d 56, 58-59 (7th Cir. 1982); *Stewart* v. *United States*, 655 F.2d 741, 742 (7th Cir. 1981); *Carr* v. *Veterans Administration*, 522 F.2d 1355, 1357-1358 (5th Cir. 1975); *Evans* v. *United States Veterans Administration Hos-*

pital, 391 F.2d 261 (2d Cir. 1968), cert. denied, 393 U.S. 1040 (1969).

Petitioner makes no effort to answer this interpretation of Rule 15(c) in a suit against a federal agency or officer. She instead seeks to denigrate that requirement as a "procedural technicalit[y]" (Pet. 9, 15) and suggests that the court of appeals should have ignored it in order to enable her to vindicate her civil rights. But as this Court stressed in *Baldwin County Welcome Center*, *supra*, there is no basis "for giving Title VII actions a special status under the Rules of Civil Procedure" (slip op. 3). Nor can rules pertaining to the proper parties to a suit be dismissed as mere technicalities. It is the named defendant who will be bound by the judgment if the plaintiff prevails. Moreover, where, as in Title VII, Congress has created a cause of action against the federal government and specified the federal officer against whom it must be brought, the courts may not decline to enforce that requirement because of their own views regarding appropriate pleading practice.

b. Petitioner also ignores the fact that the second paragraph was added to Rule 15(c) in 1966 to address precisely the situation presented here. The courts below properly rejected the petitioner's efforts to obtain relief that goes well beyond that afforded by the 1966 amendment.

As petitioner concedes (Pet. 14-16), Rule 15(c) was amended in 1966 in response to four district court decisions that dismissed suits brought pursuant to Section 205(g) of the Social Security Act, 42 U.S.C. 405(g), seeking judicial review of the denial of Social Security benefits. In each case, the claimant had named a federal defendant other than the Secretary of Health, Education, and Welfare, who was the

only proper defendant in such an action.[9] When they discovered their mistakes, the plaintiffs sought to amend their complaints to name the proper defendant, the incumbent Secretary. But by that time the 60-day period within which to file a suit under 42 U.S.C. 405(g) had expired, and the courts denied leave to amend on the ground that such an amendment would have constituted the commencement of a new action. See Byse, *Suing the "Wrong" Defendant in Judicial Review of Federal Administrative Action: Proposals for Reform*, 77 Harv. L. Rev. 40 (1963).

It was against this background that Rule 15(c) was amended to provide that in a suit against the United States or an officer or agency thereof, an amendment to name the proper defendant would relate back if "within the period provided by law for commencing the action" against the proper federal defendant, process was delivered or mailed to the Attorney General, the United States Attorney, or an agency or officer who would have been a proper defendant if named.[10] Kaplan, *Continuing Work of the Civil Com-*

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[9] The claimants named as defendants: the United States, the Department of HEW, the Federal Security Administration, and a former Secretary who had retired from office. See *Cohn* v. *Federal Security Administration*, 199 F. Supp. 884 (W.D.N.Y. 1961); *Hall* v. *Department of HEW*, 199 F. Supp. 833 (S.D. Tex. 1960); *Sandridge* v. *Folsom, Secretary of HEW*, 200 F. Supp. 25 (M.D. Tenn. 1959); *Cunningham* v. *United States*, 199 F. Supp. 541 (W.D. Mo. 1958).

[10] The second paragraph of Rule 15(c) provides that clauses (1) and (2) of the first paragraph are deemed satisfied if process was mailed or delivered to any of the officers described in the text. The first paragraph of Rule 15(c) requires that clauses (1) and (2) be satisfied "within the period provided by law for commencing the action against [the proper defend-

mittee: 1966 Amendments of the Federal Rules of Civil Procedure (I), 81 Harv. L. Rev. 356, 407-410 (1967). There is no suggestion in the Rule that it was intended to permit relation back of an amendment naming the proper federal defendant where, as here, process was not delivered or mailed to the Attorney General, the United States Attorney, or the proper defendant "within the period for commencing the action," but only some months *after* the expiration of that period. To the contrary, the Advisory Committee notes to the 1966 amendments to Rule 15(c) state that in the four Social Security Act cases that had given rise to the amendments that specifically address relation back in suits against federal defendants, "the government was put on notice of the claim *within* the stated period—in the particular instances, by means of initial delivery of process to a responsible government official (see Rule 4(d)(4) and (5))." Fed. R. Civ. P. 15 advisory committee note (emphasis added).

c. In urging this Court to grant certiorari, petitioner relies (Pet. 10-12, 15-16) on decisions of the Second, Fifth, and Sixth Circuits and contends that the judgment below conflicts with those decisions. See *Ingram* v. *Kumar*, 585 F.2d 566 (2d Cir. 1978), cert. denied, 440 U.S. 940 (1979); *Kirk* v. *Cronvich*, 629 F.2d 404 (5th Cir. 1980); and *Ringrose* v. *Engelberg Huller Co.*, 692 F.2d 403 (6th Cir. 1982). Petitioner contends that under these decisions, it is not necessary that the proper defendant actually receive notice of the commencement of the action within the statutory period for commencing an action; in petitioner's

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ant]," and therefore requires that delivery or mailing of process to any of the federal officials specified in the second paragraph occur within that period.

view, if that defendant receives notice through service of process within a "reasonable time" after the statute of limitations has run or the complaint was filed, the requirements of Rule 15(c) should be deemed satisfied. Petitioner's reliance on the Sixth Circuit's decision in *Ringrose* is wholly misplaced, because the majority in that case expresly did not reach this issue and instead remanded for consideration of whether the defendant had received notice *within* the limitations period. 692 F.2d at 405. Only the concurring opinion of Judge Jones addressed the question petitioner raises. *Id.* at 406-412. For this reason, there clearly is no conflict between the decision below and the Sixth Circuit's decision in *Ringrose*.

There likewise is no conflict with the decisions of the Second and Fifth Circuits. *Ingram* v. *Kumar*, *supra*, was a malpractice action against a physician brought under the district court's diversity jurisdiction, and the state statute of limitations therefore was applicable. The Second Circuit acknowledged that the requirement in Rule 15(c) that the proper defendant receive actual notice within the period prescribed by law for commencing the action against him "seems to mean the applicable statute of limitations period" (585 F.2d at 571), but it concluded that this interpretation need not apply in jurisdictions where timely service of process may be affected after the statute of limitations has run (*id.* at 572). Similarly, in *Kirk* v. *Cronvich*, *supra*, which was an action under 42 U.S.C. 1983 against a state sheriff and therefore was also governed by a state statute of limitations, the court simply followed *Ingram* without extended analysis (629 F.2d at 408).

Even with regard to suits against non-federal parties, as in *Ingram* and *Kirk*, the Second and Fifth

Circuits are in a distinct minority. Six other courts of appeals have taken a contrary view and held that such a defendant sought to be brought in by the amendment must have received notice within the period of the statute of limitations,[11] as the plain language of the first paragraph of Rule 15(c) requires. See Note, *Federal Rule of Civil Procedure 15(c): Relation Back of Amendements*, 57 Minn. L. Rev. 83, 103-105 (1972). But whatever the proper resolution of any conflict between *Ingram* and *Kirk* and the decisions of the six other courts of appeals, that conflict has no bearing on the instant case.

Neither *Ingram* nor *Kirk* involved a suit against a *federal* agency or officer that was governed by the special notice provisions in the second paragraph of Rule 15(c) and by a congressionally prescribed *federal* limitation, such as that in Section 717(c) of the Civil Rights Act of 1964, on the period within which a suit may be brought. Whatever the legitimacy in a suit against a non-federal party of extending a state statute of limitations to include a reasonable time for service of process, on the theory that the

[11] See *Holden* v. *Massachusetts Commission Against Discrimination*, 671 F.2d 30, 37-38 (1st Cir. 1982); *Hernandez Jimenez* v. *Calero Toledo*, 604 F.2d 99, 102-103 (1st Cir. 1979); *Britt* v. *Arvanitis*, 590 F.2d 57, 62 (3d Cir. 1978); *Varlack* v. *SWC Caribbean, Inc.*, 550 F.2d 171, 174-175 (3d Cir. 1977); *Wood* v. *Worachek*, 618 F.2d 1225, 1229-1230 (7th Cir. 1980); *Trace X Chemical, Inc.* v. *Gulf Oil Chemical Co.*, 724 F.2d 68, 70 (8th Cir. 1983); *McCurry* v. *Allen*, 688 F.2d 581, 584-585 (8th Cir. 1982); *Korn* v. *Royal Caribbean Cruise Line, Inc.*, 724 F.2d 1397, 1400-1401 (9th Cir. 1984); *id.* at 1402 (Wallace, J., dissenting); *Craig* v. *United States*, 413 F.2d 854, 857-858 (9th Cir.), cert. denied, 396 U.S. 987 (1969); *Watson* v. *Unipress, Inc.*, 733 F.2d 1386, 1390 (10th Cir. 1984); *Archuleta* v. *Duffy's Inc.*, 471 F.2d 33 (10th Cir. 1973).

suit is not "commenced" against a party until service of process upon him (cf. *Walker* v. *Armco Steel Corp.*, 446 U.S. 740, 742-743 (1980)), there is no basis for extending a federal limitation period in a suit against a federal defendant in that manner. And, as noted above (see pages 17-18, *supra*), the only courts of appeals that have considered the question in the context of a suit against a federal defendant have held that the defendant must receive notice within the applicable limitations period.

Indeed, both the Second and Fifth Circuits, which decided *Ingram* and *Kirk*, previously had reached a different result in cases against the federal government. See *Evans* v. *United States Veterans Administration Hospital*, 391 F.2d 261 (2d Cir. 1968), cert. denied, 393 U.S. 1040 (1969); *Carr* v. *Veterans Administration*, 522 F.2d 1355 (5th Cir. 1975). In those cases, the court of appeals, relying upon Rule 15(c), held that the amendment to the complaint in a Federal Torts Claims Act (FTCA) suit to substitute the United States for the agency as the named defendant did *not* relate back to the date of the filing of the complaint because neither the United States nor any governmental entity on its behalf received actual notice of the suit within the two-year period provided under 28 U.S.C. 2401(b) for bringing an FTCA suit. *Evans*, 391 F.2d at 262; *Carr*, 522 F.2d at 1357-1358. In sum, there is no conflict among the courts of appeals on the application of Rule 15(c) to a suit against the federal government.

d. No doubt because of the explicit requirement in Section 717(c) of the Civil Rights Act of 1964 that the head of the department or agency be named as the defendant, the question presented in this case does not appear to have risen with much frequency in Title

VII suits.[12] Nor will petitioner suffer any prejudice from a denial of certiorari here. Petitioner held a full-time position with the Postal Service when she sought the part-time letter carrier's position. Because the part-time position would have resulted in reduced total pay, no back pay would be awarded in this case even if petitioner prevailed. In addition, we have been informed by the Postal Service that petitioner has now obtained a part-time position as a postal clerk and that, through counsel, she has informed the Postal Service that she no longer is interested in obtaining the part-time position as a letter carrier that was involved in this Title VII suit. For these reasons, all that remains at issue in this case is the question of attorney fees, and a major portion of those fees is attributable to work in the court of appeals and this Court that was made necessary only because of the attorney's own error in failing to name the proper party in the complaint. Even if the particular relation-back question otherwise warranted review, it would be more appropriate for the Court to consider the matter in a case in which there is actually something at stake for the Title VII plaintiff.

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[12] In her December 14, 1984 letter to the Clerk of this Court, petitioner cites three cases in the Southern District of California in which suits were dismissed on the authority of the Ninth Circuit's decision in this case. *Shen* v. *Lehman*, No. 83-362 (Nov. 28, 1984); *Alexander* v. *Lehman*, No. 82-1607 (Oct. 25, 1984); *Neff* v. *Lehman*, No. 83-0186 (Oct. 26, 1984). We have been informed by the United States Attorney, however, that the plaintiff in those cases was represented by the same law firm that represented petitioner in district court. There accordingly is no reason to believe that the error is common among other lawyers—or, indeed, that such a failure to comply with an explicit statutory standard might not provide a basis for a malpractice claim by a client prejudiced thereby.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

REX E. LEE
Solicitor General

RICHARD K. WILLARD
Acting Assistant Attorney General

ROBERT S. GREENSPAN
MARILYN S. G. URWITZ
Attorneys

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